RAMAMOORTHY v. MENTRI BESAR OF SELANGOR & ANOR.

[O.C.J. (Abdul Aziz J.) April 3, 1969]
[K.L. — Civil Suit No. 1440 of 1968]

Government Proceedings — Relief — Specific performance — Whether court can make order for — Declaratory order — Government Proceedings Ordinance, 1956, s. 29(1)(a).

Practice and Procedure — Declaration — Application for — Proper procedure is by way of originating summons — Joinder of parties — R.S.C., 1957, O. 54A r. 1A.

Land Laws — Auction — Sale of land to recover arrears of quit rent — Service of notice on proprietor — Irregularity — Annulment of sale — Discretion of Mentri Besar — Land Code (F.M.S. Cap. 138), ss. 204, 220, 221.

In this case the Mentri Besar had annulled a sale of land belonging to one Packeer Mohideen for recovery of arrears of quit rent on the ground of material irregularity in that the notice for sale had not been properly served. The plaintiff had bought the land at the public auction and she brought an action for a declaration that the annulment was null and void and she also claimed specific performance, damages and costs.

Held: (1) by virtue of section 29(1)(a) of the Government Proceedings Ordinance, 1956 the court could not make an order for specific performance in this case but could only make an order declaratory of the rights of the parties;

(2) the application for a declaration should have been made by originating summons in accordance with the provisions of R.S.C., 1957, O. 54A r. 1A and the application should have been served on the registered proprietor;

(3) the Mentri Besar had a discretion to annul the sale and as there was no question of bad faith or want of jurisdiction in this case the court could not interfere with the exercise of his jurisdiction.

Case referred to:—

(1) *London Passenger Transport* v. *Moscrop* [1942] A.C. 332.

CIVIL SUIT.

D.P. Vijendram for the plaintiff.

Haji Mohamed Azmi bin Dato' Haji Kamaruddin (Legal Adviser, Selangor) for the defendants.

Cur. Adv. Vult.

Abdul Aziz J.: This is an action by way of specially indorsed writ against the Mentri Besar of Selangor and the Government of the State of Selangor as co-defendants claiming:

(1) that the annulment of the auction sale made by the Mentri Besar pursuant to section 221 of the Land Code (Cap. 138) be declared null and void;

(2) for specific performance; and

(3) for damages at large.

The facts of the case are briefly as follows: On 15th June, 1964, the Collector of Land Revenue, Ulu Selangor, issued a notice of auction sale for recovery of arrears of quit rent against the registered proprietor of Grant 9562, Lot 1842, Rawang, i.e. one Packeer Mohideen addressed to 9 Leboh Pudu, Kuala Lumpur. Failing to obtain any satisfaction, the collector, on the 3rd September, issued a public notice of sale which was duly gazetted and publicised. On 24th November, 1964, a public auction was held at which the said land was knocked down to the plaintiff for $4,450. The market value of the land was said to be much more. It was later discovered that through the negligence of the notice server, the notice had been served on a complete stranger. It was also later discovered that the address given was that of a shop under liquidation and was at the time under the control of an official administrator and that the registered proprietor was then in India. Before the sale became final and conclusive, i.e. before the statutory period of 3 months expired, the Mentri Besar acting under section 221 of the Land Code and on the recommendation of the collector annulled the sale on ground of "material irregularity" in that the notice of sale was not served on the proprietor or his recognised agent. The plaintiff now alleges that the reason for the annulment was unwarranted and accordingly seeks a declaration that the annulment was null and void. She also claimed specific performance, damages and costs.

It is clear that the claim for specific performance is not sustainable by virtue of the provisions of section 29(1)(a) of the Government Proceedings Ordinance, 1956. Under the Ordinance, the court could only make an order "declaratory of the rights of the parties".

Application for a declaration by way of specially indorsed writ is, to my mind, not the proper procedure. Such a declaration should have been sought under Order 54A rule 1A which reads:—

> "Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any written law, may apply by *originating summons* for the determination of such question of construction, and for a declaration as to the right claimed."

Even if the procedural irregularity could be ignored, one cannot ignore the fact that the registered proprietor who has a real interest in the matter was not made a party to the action. Until the auction sale became final and conclusive, his ownership over the property remained intact. His rights will be placed in jeopardy if the declaration were made. Also, it would be in breach of the rules of natural justice to do so in his absence and there are no special circumstances which would justify it.

In *London Passenger Transport* v. *Moscrop* [1] at page 344 Viscount Maugham after reminding himself that the power to pass declaratory judgments should be exercised with "great care and jealousy" and with "extreme caution" went on to deal with non-joinder of interested parties thus:—

"I also think it desirable to mention the point as to parties in cases where a declaration is sought . . . . the persons really interested were not before the court, for not a single member of the Transport Union was, nor was the union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or othewise, before a declaration by its terms affecting their rights is made."

On merits, the main ground relied on by the plaintiff is that under the Land Code and the Notice of Sale Rules 1933 there is no requirement that the registered proprietor or his agent should be personally served with notice of sale and annulment of sale on that ground alone is insufficient. Section 204 reads:—

"Upon any sum payable becoming an arrear the collector shall, subject tc the provisions of any rules made under sub-section (ii), use reasonable diligence in causing to be served on the proprietor of the land affected a notice of sale in the prescribed Form, which shall be sealed with the collector's seal of office."

Section 221(1) reads:—

"The Mentri Besar may at any time before a sale under this Part has become final and conclusive upon proof to his satisfaction that the sale was had contrary tc the provisions of this Part and that material irregularities occurred or that any proprietor or other person will suffer excessive hardship by reason of such sale, annul such sale by order in writing."

Section 220 reads:—

"A sale under this Part shall become final and conclusive on the expiry of three months from the date thereof unless

(c) the sale has prior to the date of such expiry been annulled by the Mentri Besar under the provisions of section 221;"

To my mind, when section 204 imposes a requirement on the collector to use reasonable diligence to serve the notice of sale on the proprietor, it expects the collector to use such care that "men generally would exert in respect of their own concerns". A careless service on a stranger without proper enquiry as to the whereabouts of the registered proprietor would be contrary to the provisions of the section and an irregularity, the degree of which may or may not be material. If, however, after an enquiry, he could not be found or is found to be resident outside the district, then under the rules no personal service need be made. Any irregularity in regard to service would then be protected by sub-section (iii).

Under section 221, the Mentri Besar may annul the sale upon proof to his satisfaction that —

(i) the sale was had contrary to the law; and

(ii) that material irregularities occurred.

The discretion is clearly his and the court in the exercise of its supervisory jurisdiction has always been slow in interfering with the exercise of such discretion unless, amongst other things, there was bad faith or want of jurisdiction. Clearly, in this case, there was no question of *mala fides* or want of jurisdiction. Once there is jurisdiction to make such an order and there are some grounds for making it, it is not for this court to question the adequacy or otherwise of the grounds.

Consequently, this claim will be dismissed with costs.

Application dismissed.

Solicitors: *Athi Nahappan & Co.*

COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA v. WENG LOK MINING CO. LTD.

[O.C.J. (Raja Azlan Shah J.) April 3, 1969]

[K.L. — Civil Court No. 1787 of 1968]

Practice anl Procedure — Specially indorsed writ — R.S.C., 1957, O. 14 — Delay in application for summary judgment — No bona fide defence shown — Income Tax Ordinance, 1947, s. 86(3).

The plaintiff had claimed by specially indorsed writ an amount due for income tax and penalty. The writ was issued on October 4, 1968, an appearance was entered on October 15, 1968 and subsequently a denfence was filed on October 31, 1968. The plaintiff took no further steps until January 31, 1969 when he filed an application for summary judgment under R.S.C., 1957, O. 14. The defendant company sought to set aside the application on the ground of undue delay on the part of the plaintiff.

Held: (1) in the circumstances of this case the delay of three months was not inordinate and did not warrant a dismissal of the application;

(2) the defendant company had not shown that it had a *bona fide* defence or that there was any question of fact or law which ought to be argued in this case and therefore the plaintiff's application for summary judgment must be allowed.

Cases referred to:—

(1) *McLardy* v. *Slateum* (1890), 24 Q.B.D. 504.

(2) *Comptroller of Income Tax* v. *A. Company Ltd.* [1966] 2 M.L.J. 282.

(3) *Comptroller of Income Tax* v. *R.S.T.* [1962] M.L.J. 216.

(4) *Jacobs* v. *Booth's Distillery Co.* (1900), 85 L.T. 262, H.L.